BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between LACSSA/LIUNA, LOCAL 777 and THE CITY OF LOS ANGELES DEPARTMENT OF TRANSPORTATION	Arbitration No. 2153 Lloyd Alexander Grievance

Appearances:

Rothner, Segall & Greenstone, Attorneys at Law, by Mr. Ricardo Ochoa, 510 South Marengo Avenue, Pasadena, California 91101, appearing on behalf of the Union.

Mr. Don Harrahill, Senior Personnel Analyst II, Department of Transportation, 221 North Figueroa Street, Suite 500, Los Angeles, California 90045, appearing on behalf of the Employer.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, LACSSA/LIUNA, Local 777, hereinafter referred to as the Union, and the City of Los Angeles Department of Transportation, hereinafter referred to as the Employer or City, the undersigned was selected to serve as arbitrator of the Lloyd Alexander grievance. Hearing was held on May 15, 2002, in Los Angeles, California, at which time the parties presented such testimony, exhibits and other evidence as was relevant to the dispute. The parties made oral arguments at the conclusion of the hearing. The record was closed upon receipt of the transcript on June 5, 2002.

Now, having considered the evidence, the arguments of the parties, the contract language and the record as a whole, the undersigned makes the following Award.

ISSUE:

At the outset of the hearing, the parties agreed to state the issue as follows:

Whether the Employer violated any terms of the Memorandum of Understanding, Manual of Policies and Procedures 273, or the Employee Relations Ordinance in denying the grievant's request to be transferred or reassigned to Southern Division?

If so, what is the appropriate remedy?

PERTINENT MEMORANDUM OF UNDERSTANDING (MOU):

ARTICLE 7 NON-DISCRIMINATION

The parties mutually reaffirm their respective policies of non-discrimination in the treatment of any employee because of race, religious creed, color, sex, age, sexual orientation, LACSSSA/LIUNA activity, national origin, or ancestry.

MANUAL OF POLICIES AND PROCEDURES (MPP) 273:

A. Purpose

This Section describes the procedure for filing complaints of perceived discriminatory acts or practices.

The Discrimination Complaint Procedure is a means by which an employee can present and have considered complaints of discrimination on the basis of race, color, sex, age, religion, national origin, disability, marital status, sexual preference, medical condition (cancer), Acquired Immune Deficiency Syndrome (AIDS) – acquired or perceived, or in retaliation for having participated in a discrimination complaint. (Joint Exhibit 6)

EMPLOYEE RELATIONS ORDINANCE (ERO):

Sec. 4.859. **City Management Rights.**

Responsibility for management of the City and direction of its work force is vested in City officials and department heads whose powers

and duties are specified by law. In order to fulfill this responsibility it is the mission of its constituent departments, offices and boards, set standards of services to be offered to the public and exercise control and discretion over the City's organization and operations. It is also the exclusive right of City management to take disciplinary action for proper cause, relieve City employees from duty because of lack of work or other legitimate reasons and determine the methods, means and personnel by which the City's operations are to be conducted and to take all necessary actions to maintain uninterrupted service to the community and carry out its mission in emergencies; provided, however, that the exercise of these rights does not preclude employees or their representatives from consulting or raising grievances about the practical consequences that decisions on these matters may have on wages, hours and other terms and conditions of employment; provided, however, that employees in the representaiton (sic) unit Police Officers, Lieutenants and Below or their representatives may not raise such grievances. (Amended September 1986)

SETTLEMENT AGREEMENT:

. . .

4. In exchange for the promises of the Complainant in this agreement, Respondents agree to:

. . .

b. Respondents shall not assign LILLIE BRIGGS and LLOYD ALEXANDER to the same division and same shift so that ALEXANDER is or would be the supervisor of BRIGGS.

c. Respondents shall attempt not to assign BRIGGS and ALEXANDER to the same overtime events or other special events. However, the needs of respondent regarding proper human resource allocation and management are paramount. Also, neither BRIGGS nor ALEXANDER should be unduly deprived of the right to earn overtime pay. Therefore, it is recognized that circumstances may require that BRIGGS and ALEXANDER be assigned to the same overtime event or special event. The Department of Transportation, Bureau of Parking Enforcement, will make every reasonable effort to prevent the assignment of Senior Traffic Supervisor LLOYD ALEXANDER and Traffic Officer LILLIE BRIGGS to the same shift assignment when they are on regular duty. However, Special Events and emergency response assignments may require that they both work the same location and shift. It is agreed that respondent

> Department of Transportation will exercise its best efforts to prevent the assignment of BRIGGS and ALEXANDER to the same overtime Special Event or emergency response assignment, but that if such an assignment were nevertheless to occur, it will not constitute a breach of this settlement agreement.
>
> . . .
>
> (Union Exhibit 1)

FACTS:

The grievant, Lloyd Alexander, has been employed by the City of Los Angeles Department of Transportation in the Parking Enforcement Division since 1973. He is a Senior Traffic Supervisor I.

The Parking Enforcement Division has five geographic area offices. They are the Central, Southern, Hollywood, Western and Valley parking enforcement offices. The grievant has worked at the Western office or Division since 1997. He works the first shift, 7:00 a.m. – 3:30 p.m.

In 1996, the grievant had a knee replacement and pin placed in his hip which resulted in a work restriction against prolonged standing. Said work restriction was accommodated at Western at all times. On March 1, 2000, the grievant's doctor [1] issued another restriction which limited his driving to no more than 30 – 40 minutes. [2] Upon return to work, the grievant submitted a doctor's certificate to his immediate supervisor, Don Howard, but the Employer has no record of the submission.

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[1] He was the same doctor who performed his surgery in 1996 and was an authorized Workers' Compensation doctor.

[2] Union Exhibit 2.

In early 2001, (sometime prior to February 15) the grievant requested a transfer to the Southern office, second shift. The grievant testified that he requested the transfer because it was closer to his home, 5 – 7 minutes, and because he wanted to earn extra money generated by the shift premium. The driving time from Western to his home is between 30 – 45 minutes, depending on the traffic.

There is no contractual provision or Employer policy that addresses transfers. However, almost all supervisor transfers in the Division are accomplished as a result of employee requests and the Employer's accommodation of same. In February 2001, there were ten such transfer requests, including the grievant's. On February 15 all requests for transfer were granted effective March 4, 2001. However, by memo dated March 1, 2001, from Deputy Chief Rudy Carrasso, the grievant's transfer request was rescinded for the following reason:

> Recently, information was provided to this office regarding the pending sergeant transfers scheduled to take place on March 4, 2001. As a result of a review of this information and on the advice of the City Attorney, the Bureau is rescinding the transfers of the following Sergeants:
>
> Lloyd Alexander
> Arthur Manley
> Steven Wright
>
> . . . [3]

[3] Joint Exhibit 4.

It is noted that transfers of Manley and Wright were rescinded as a chain reaction result of Alexander's transfer rescission.

The information referred to in the above memo was the advice of the City Attorney that the transfer should be rescinded because of a settlement agreement, in which the grievant was a party, that prohibited his assignment to the same Division (Southern) that employee (Complainant) Lillie Briggs [4] was assigned to.

By letter dated March 7, Deputy City Attorney Molly Roff-Sheridan, sent the following letter to Steven Bechumeur, the Union representative:

> I write to you in relation to the above. Mr. Alexander called me last week and faxed to me the settlement agreement between the City, Mr. Alexander, Lillie Briggs, and the California Department of Fair Employment and Housing.
>
> He called to confirm that the fax had been delivered and received, and my secretary advised him that it had. He has called me several times thereafter, and I do not feel it appropriate to speak to him. While I was representing him in relation to the FEH accusation by Ms. Briggs, Mr. Alexander and I may well be adversaries in the future, should he convince the union to file a grievance and proceed to arbitration in relation to his wanting to transfer to South. In light of that possibility, I will not return his calls or in any way talk to him. I write to you to advise you of that fact, and to make sure that, for purposes of time limits in relation to a grievance, the department has reviewed the settlement agreement language and remains of the opinion that to assign Mr. Alexander to South would be inconsistent with the settlement agreement, for the reasons communicated to you by John Fick.
>
> Please also note that I have had discussions with James Otto of DFEH, who agrees with my analysis and position, and has expressed his agreement to testify as to the meaning of the settlement agreement in the event Mr. Alexander decides to take the issue to arbitration. As Mr. Otto noted to me in our discussion, Ms. Briggs gave up the potential for a significant amount of money (if she took her case to trial and a jury agreed with her allegations) simply to "buy peace." She has a right to that peace. Nor can she be asked to transfer or otherwise do anything that would be inconsistent with the bargain that she agreed to and that Mr. Alexander agreed to. There is no time limit on the settlement

[4] Briggs filed a sexual harassment complaint with the Department of Fair Employment and Housing that resulted in the July, 1998 settlement agreement in question. Briggs called John Fick, Senior Personnel Analyst at the time and liaison to the Office of Parking Management in late February when she heard of the grievant's transfer and objected claiming it would be a violation of the settlement agreement.

agreement, and it is our position that Mr. Alexander cannot work where he would be in contact with Ms. Briggs, even if that was only for a limited period of time when the shifts are coming in and going off.

. . .

On March 9, the grievant filed the following grievance:

Denied reassignment to DOT Southern. I've been on loan to DOT Western Area for over 4 years. I am being denied the opportunity to participate in the transfer process to go to the area of my choice as other supervisors. I am an employee with disabilities and I need to be assigned to the location closest to my home. That location is DOT Southern. I have cooperated with the Department for the past 4 ½ year without complaining. Now my body is telling me that the Department of Transportation and I can no longer abuse my disabilities.

He cited the following Memorandum of Understanding (MOU) and rule violations:

MMP Section 273, MOU Article #7, Memo From the General Mgr, Settlement Agreement by the City of L.A. Case #'SE96-97-1106-00SE/E96-97-B-1106-01SE, California Labor Code, Work Compensation Labor Code 132A, Americans With Disability Act, deformation (sic) of character. I am being treated with gross disparity, blatant discrimination, and all other pertinent sections of rules and regulations. [5]

The Employer answered the grievance as follows:

Mr. Alexander signed a settlement agreement in 1998 between the City, Mr. Alexander, Lillie Briggs, and the California Department of Fair Employment and Housing. Mr. Alexander believes that the agreement does not preclude him from being reassigned to the Southern Area Office. After reviewing the settlement agreement and consulting with the City Attorney, it is our position that Mr. Alexander cannot be assigned to work where he would be in contact with Ms. Briggs, even if that was only for a limited period of time when the work shifts are coming in and going off. Ms. Briggs, who is working at the Southern Area Office, is insisting that the agreement be enforced, and the California Department of Fair Employment and Housing is also insisting that it be enforced.

[5] Joint Exhibit 2, pp. 1-2.

> Therefore, Mr. Alexander's request to be reassigned to the Southern Enforcement Area Office cannot be accommodated since such an assignment would be inconsistent with the settlement agreement.
>
> Mr. Alexander is also claiming that he has disabilities and needs to be assigned to the work location closest to his home, which is the Southern Area Office. Mr. Alexander has not requested this type of accommodation prior to the filing of this grievance initiation. Mr. Alexander is currently being accommodated at the Western Area office for permanent work restrictions that he sustained from an injury on June 19, 1996. Although Mr. Alexander cannot be transferred to the Southern Area Office because of the settlement agreement, Management will meet with Mr. Alexander to determine if the claimed disabilities Mr. Alexander refers to are in addition to his permanent work restrictions, and to discuss possible options for reasonable accommodation. [6]

In an effort to accommodate the grievant, the Employer, during the processing of the grievance, offered the grievant a second shift assignment at the Hollywood office which is located closer to his home (7.7 miles versus 9.7 miles) and also paid a night bonus. [7]

The grievant refused.

POSITIONS OF THE PARTIES:

Union's Position

The Union concedes that there is no formal written contract language or policy that addresses transfers or confers rights to employees with regard thereto. However, it argues that the Employer cannot rescind a transfer request once approved, unless for good reason. Here, the Union contends the sole reason for recission of the grievant's request was the Employer's belief that it would violate the settlement agreement as it applied to the grievant and employee Lillie Briggs.

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[6] Joint Exhibit 2, p. 4.

[7] Joint Exhibit 2, pp. 11-12.

The Union argues that the settlement agreement is clear on its face and it simply does not prohibit the assignment of the grievant to the same Division that Briggs is assigned to as long as they are not on the same shift. The Union argues that the applicable provision of the Settlement Agreement, paragraph 4. b., is not written in the disjunctive, but rather states that the two employees shall not be assigned to ". . . the same division and same shift . . ." The Union argues that in order to breach the agreement, they would have to be assigned to the same Division and shift; it is not the same Division or shift. Further, it is argued that because the language is clear and unambiguous no extrinsic evidence can or should be considered to aid in its interpretation.

The Union claims that the Employer, now, for the first time is also claiming that regardless of the settlement agreement, the grievant has no transfer rights and management retains the sole right to make transfer decisions. It is the Union's position that the Employer should be estopped from changing their position in arbitration. To allow same, according to the Union, would be detrimental to the grievance process and the parties' ability to resolve grievances. In any event, it is the Union's position that once a transfer is granted it cannot be rescinded solely on the basis of management's right regardless of the reason. In this regard the Union argues that while the City relies on ERO Sec. 4.859 in support of its right to do so, said provision specifically provides that the practical consequences of decisions regarding management rights can be grieved. Further, the Union contends that it is the practice of the Employer to grant transfer requests and that it is done on the basis of seniority.

It is also the Union's position that the reason for the grievant's request for transfer was so that he would be closer to home. The Union argues that the grievant was working under a work restriction of limiting driving to 30 – 40 minutes as certified by his doctor in March, 2000 (Union Exhibit 2), and presented to his supervisor, Don Howard. The Employer, the Union

contends, was obligated to accommodate the grievant's disability. The Southern office was 7 – 10 minutes from his home while the Western office was 30 – 45 minutes. In this regard, the Union claims the Employer's offer to transfer to the Hollywood office would not have accommodated the grievant's disability and, further, was only made as a settlement offer.

It is the Union's position that the above conduct of the Employer violated both the MOU and MPP 273 because it constituted discrimination and retaliation against the grievant for having participated in the investigation of a discrimination complaint. It also discriminated against him for his disability.

Based on the above, the Union requests that the Arbitrator sustain the grievance and make the grievant whole.

Employer's Position

The Employer argues that it is clear from the record that there is no department policy, work rule, or provision in the MOU which required the reassignment of the grievant to the Southern office. Management, it is contended, exercised its management right, under Section 4.859 of the Employee Relations Ordinance when it chose not to reassign the grievant.

The Employer argues that the decision to rescind the grievant's transfer was based on legal advice it received from the City Attorney's office that such a transfer would be in violation of the Settlement Agreement, which it is argued prohibited the assignment of the grievant to the same Division in which Briggs is assigned to. This, it is claimed, constituted a sufficient reason not to transfer the grievant and well within its prerogative.

With respect to the grievant's disability claim and accommodation for same, the Employer argues that the most recent alleged restriction and doctor's certificate (Union Exhibit 2) was never presented to management during the processing of the grievance. Further,

the Employer finds noteworthy that even though the grievant had some alleged restriction since March 2000, he did not request to transfer to any other location closer to home in order to accommodate the driving restriction. In this regard, the Employer argues that the Hollywood office was closer to his home and a transfer there was offered, but rejected by the grievant.

It is the Employer's position that the Union has failed to prove its claim of discrimination based on disability or that it violated the MPP provision addressing discrimination.

Based on the above, the Employer urges the Arbitrator to deny the instant grievance in its entirety.

DISCUSSION:

It is undisputed that the grievant was first granted his request for a transfer to Southern Division and then denied same because of the Settlement Agreement he entered into with a fellow employee.

The Employer first argues that said Settlement Agreement, as agreed to by the grievant, prohibits his assignment to the same Division as employee Briggs and, therefore, there has been no violation as alleged by the Union in denying his transfer.

The Employer also argues that in any event employees do not have a right, either by contract, rule or policy, regarding transfers and, therefore, the rescission of the grievant's initial approval of transfer did not constitute a violation.

The critical settlement agreement language in issue is the following: "Respondents shall not assign LILLIE BRIGGS and LLOYD ALEXANDER to the same division and same shift so that ALEXANDER is or would be the supervisor of BRIGGS." It is this language the Employer argues, that prohibits the assignment of the grievant to the same Division as employee Briggs.

The Employer in its answer to the instant grievance took the position ". . .that Mr. Alexander cannot be assigned to work where he would be in contact with Ms. Briggs even if that was only for a limited period of time when the work shifts are coming in and going off."

In the opinion of the Arbitrator, the Settlement Agreement language, reasonably interpreted, does not support the Employer's position. It simply is not as broad and general as claimed by the Employer.

To the contrary, the language is specific and prohibits assignment of the grievant to the same Division and shift. Not Division or shift. The agreement is not worded to prohibit assignment to the same division if it results in any contact at all between the grievant and Briggs, including shift change contact, as argued by the Employer. Any arguable ambiguity of said language is amply clarified by the last proviso that states ". . . so that ALEXANDER is or would be the supervisor of BRIGGS." Clearly, said language evinces the parties' intent to prohibit a situation where the grievant would work the same shift as Briggs and act as her supervisor. To interpret the language otherwise, as argued by the Employer, would render the above-quoted language superfluous. [8] Said language really is only susceptible to one reasonable interpretation.

Having concluded that the Settlement Agreement does not prohibit or preclude the grievant's transfer, the issue remains whether the Employer violated the MOU or its ERO Sec. 4.859 by rescinding his approved transfer.

With respect to employee transfer rights, there, clearly, is no formal written transfer policy either by MOU, rule or otherwise. Rather, it falls within the City's management rights as

[8] The attorneys who drafted the language offered testimony as to their intent of the language, but language as patently clear and unambiguous on its face as the disputed language herein, must stand on its own. The parole evidence rule precludes the use of extrinsic evidence if the written agreement clearly and unambiguously sets forth the intent of the parties. (See Elkouri and Elkouri, How Arbitration Works, pp. 598-599 (BNA, 5th ed. 1997)).

set forth in Sec. 4.859. Said section specifically provides that the "responsibility for management of the City and direction of its work force is vested in City officials and department heads" and that "it is also the exclusive right of the City management to. . . determine the methods, means and personnel by which the City's operations are to be conducted. . . ."

However, the ordinance also provides ". . .that the exercise of these rights does not preclude employees or their representatives from consulting or raising grievances about the practical consequences that decisions on these matters may have on wages, hours and other terms and conditions of employment".

Therefore, it only follows that since the management rights exercised by the City pursuant to Sec. 4.859 are grievable, said grievances are subject to the grievance procedure of the parties' collective bargaining and within the purview and authority of the Arbitrator.

In applying Sec. 4.859 to the instant case, the Arbitrator notes that since the City's right to ". . .determine the methods, means and personnel by which the City's operations are to be conducted. . ." is "exclusive", the City's exercise of same is minimally limited and only to the extent that the exercise of such right cannot be done in an arbitrary, capricious, bias or discriminating manner.[9]

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[9] No evidence was presented with respect to this issue (appropriate standard). The Arbitrator bases his conclusion on a reasonable interpretation of Sec. 4859 itself. Also, arbitral authority consistently interprets management rights clauses using this standard.

Thus, as it relates to this case, the issue is whether the Employer acted arbitrarily, capriciously, discriminatorily or in a bias manner in exercising its management transfer rights with respect to the grievant.

Here, it is undisputed that almost all transfers are accomplished by requests and not involuntarily made. Thus, unless there is good reason for denial, requests are granted. [10]

As stated elsewhere, the only reason that the grievant's transfer was rescinded was because of the Employer's reliance on the Settlement Agreement. While the Employer acted in good faith, it, nevertheless, was clearly wrong in interpreting the Settlement Agreement as prohibiting the grievant's transfer. The grievant did not agree to give up his right to transfer to the same Division as Briggs as long as he did not work the same shift as Briggs or act as her supervisor. Here, the grievant was seeking a transfer to the second shift. Briggs worked the first shift and, thus, the grievant would not be her supervisor. The grievant, not having relinquished any transfer rights to the Southern Division (as long as it was not to the same shift as Briggs), was entitled to be treated the same as all other employees with respect to his request for transfer. All other employees are granted their transfer requests unless there is good reason for denial. The only reason the grievant's transfer was rescinded was the expansion and misapplication of the Settlement Agreement. Because the grievant was not treated the same as all other employees with respect to honoring transfer requests, the Employer violated its commitment to exercise its

[10] The Union offered testimony in an attempt to establish that requests are honored, and employees are entitled to transfers on the basis of seniority. While this may be true, the record does not establish same. The record evidence does not establish such a practice as "(1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." See Elkouri and Elkouri, How Arbitration Works, p. 632 (BNA 5th ed. 1997).

management rights in a non bias, arbitrary, capricious or discriminatory manner.[11]

Based on the above face and discussion thereon, the Arbitrator renders the following

AWARD

1. That the practical consequence of the City's exercise of its ERO Sec. 4.859 management rights in rescinding the grievant's transfer to Southern Division was biased and discriminatory vis a vis other employees.
2. That the Grievant, upon request, be transferred to Southern Division, second shift, as originally requested and approved, and, further, be made whole by paying him the difference between what he earned in wages and what he would have earned had he been transferred to Southern Division, second shift.
3. That the Arbitrator retains jurisdiction for a period of sixty (60) days to address any issue(s) that may arise in the implementation of the instant Award.

Dated at Madison, Wisconsin, this 31st day of July, 2002.

_____
Herman Torosian, Arbitrator

[11] The Union also argues that the City discriminated against the grievant by not accommodating his disability limiting his driving to no more than 30-40 minutes. The Arbitrator notes that while the grievant's claimed disability dated back to March 1, 2000, he did not ask for accommodation until a year later when the instant grievance was filed. Additionally, the City in its answer to the grievance indicated its willingness to discuss possible options for reasonable accommodations. (See Joint Exhibit 2) Lastly, while Southern Division was closer to his home, Western Division was within his driving restriction of 30-40 minutes, depending on the traffic. Based on the record evidence, the Arbitrator cannot find that the Employer discriminated against the grievant by not accommodating his handicap as alleged.